

“AMENDING THE ARBITRATION AND CONCILIATION (AMENDMENT) ACT, 2015: BOARD OF CONTROL FOR CRICKET IN INDIA V. KOCHI CRICKET PVT. LTD.”

AASTHA PHULORIA

INTRODUCTION

The Supreme Court of India, in the landmark judgment of *Board of Control for Cricket in India (BCCI) v. Kochi Cricket Pvt. Ltd.*¹, gave clarity regarding the applicability of the Arbitration and Conciliation (Amendment) Act, 2015, to pending arbitration and court proceedings which were commenced under the Parent Act of 1996. The Court held that subject to party autonomy, no amendment would apply to arbitral proceedings which were commenced before the enforcement of the Amendment Act. Nonetheless, the amendments would be applicable to court proceedings in relation to the arbitral proceedings, commenced on or after the enforcement of the Amendment Act.

However, the above stated general rule is subject to an exception. The amendment in Section 36 clarified that filing an appeal to set aside the arbitral award would not lead to an automatic stay on the enforcement of such award, unless the Court grants otherwise.² Prior to the Amendment, the position was that a party could get a stay on the enforcement of the arbitral award merely by filing an appeal.³ An important question which came for consideration before the Court in this regard was whether this amendment in Section 36 would apply to appeals filed under Section 34 before the enforcement of the Amendment Act of 2015.

Placing reference on earlier dictum of the Apex Court on various occasions⁴, Justice R.F. Nariman clarified in this case that “since execution of a decree pertains

¹ Civil Appeal Nos. 2879-2880 of 2018.

² Section 19, Arbitration and Conciliation (Amendment) Act, 2015.

³ Section 36, Arbitration and Conciliation Act, 1996.

⁴ *Lalji and Sons v. Hansraj Nathuram*, (1971) 1 SCC 721 at 728; *Narhari Shivram Shet Narvekar v. Pannalal Umediram* (1976) 3 SCC 203 at 207.

to the realm of procedure, and that there is no substantive vested right in a judgment debtor to resist execution, Section 36, as substituted, would apply even to pending Section 34 applications on the date of commencement of the Amendment Act.”

Thus, while the Court declared the Amendment Act of 2015, as a whole, prospective in nature, an exception was carved out for Section 36, which would be applicable to even those cases in which Court proceedings were initiated after the Act was amended, even if they relate to arbitrations that were initiated prior to enforcement of the Amendment Act.

FACTS OF THE CASE

The Respondents, Kochi Cricket Pvt. Ltd., commenced arbitral proceedings against the Appellants, Board of Control for Cricket in India, in 2012. The tribunal decided two arbitral awards in the favour of the Respondents in 2015. An application was filed by the Appellants in 2015 under Section 34 of the Arbitration and Conciliation Act, 1996, to set the award aside. Meanwhile, the Respondents filed for the enforcement of the two arbitral awards. This was opposed by the Appellants, who applied for the enforcement proceedings to be stayed under Section 36 of the principal Act until the Court decided the proceedings which were being conducted under Section 34. This contention of the Appellants, BCCI, was dismissed by the Hon’ble single judge stating that the provisions of Section 36 of the Amendment Act of 2015 would be applicable in the current situation. The Appellants then filed an appeal before the Supreme Court of India, challenging this judgment of the High Court.

DISCUSSIONS AND FINDINGS BEFORE THE SUPREME COURT

Segregation of Section 26 into Two Distinct Parts

One of the major questions raised in the appeal was regarding the construction and meaning of the Section 26 of the Amendment Act⁵, which says:

“26. Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of Section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings

⁵ Supra note 1.

*commenced on or after the date of commencement of this Act.” This section was heavily debated before the Court, and both the sides gave their own interpretations of it. The Appellants, Board of Control for Cricket in India, argued that Section 26 is divided in two parts. The first part is a mere proviso, whereas the second part is the principal part. It was stated that it is the second part which makes the Amendment Act applicable in relation to arbitral proceedings commenced on or after the date of commencement of this Act. This thereby makes the Amendment Act prospective in nature. A number of cases were referred to support this argument, with emphasis on *Garikapati Veeraya v. N. Subbiah Choudhry*⁶ and *Thyssen Stahlunion v. Steel Authority of India*⁷ among others”⁸.*

The Appellants further referred to the 246th Law Commission Report⁹ to support their submissions. They also cited the report of a High Level Committee¹⁰ headed by Justice B.N. Srikrishna, according to which the Amendment Act will only apply to arbitral proceedings commenced on or after the commencement of the Amendment Act and to Court proceedings that arise out of or in relation to such arbitral proceedings. The Respondents on the other hand asserted that there was no mention of Court proceedings in the first part of Section 26. This means that the Amendment Act would apply retrospectively to Court proceedings. It was submitted that the second part of Section 26 covers in its ambit both arbitral proceedings as well as Court proceedings. Therefore, Section 26 would be applicable not only to arbitral proceedings, but also Court proceedings which commenced after the Amendment Act came into force.

For this purpose, the Counsel relied heavily on paragraph 23 in *Thyssen Stahlunion v. Steel Authority of India*¹¹ and submitted that proceedings which have commenced under Section 34¹² before the Amendment Act came into force, would be governed by the Amendment Act. However, arbitral proceedings which commenced after the Amendment Act and any related application made under Section 34 would be governed by second part of Section 26 of the Amendment Act. Upon detailed discussion, all learned Counsel agreed, and the Court found on a reading of Section 26, that it is indeed in two parts. The first part refers to the

⁶ (1957) SCR 488.

⁷ (1999) 9 SCC 334.

⁸ *N.S. Nayak & Sons v. State of Goa*, (2003) 6 SCC 56; *Milkfood Ltd. v. GMC Ice Cream Pvt. Ltd.*, (2004) 7 SCC 288.

⁹ Amendments to the Arbitration and Conciliation Act 1996, August, 2014.

¹⁰ Delivered on 30th July, 2017.

¹¹ *Supra* note 8.

¹² Arbitration and Conciliation Act, 1996.

Amendment Act not applying to certain proceedings, whereas the second part affirmatively applies the Amendment Act to certain proceedings. The two parts are separated by the word 'but' which clearly implies that these parts are not only separate but also distinct.

The Court thus concluded that the language used in Section 26 of the Amended Act indicates that the provisions of amended Section 34 and Section 36 would apply when the petition is filed under Section 34 and an application for setting aside the award has been made under Section 36 after the commencement of the Act. The Amended Act was therefore declared to be prospective in nature by the Court.

THE QUESTION OF AUTOMATIC STAY IN THE POST-AMENDMENT REGIME

To decide whether Section 36 has a retrospective effect on appeals filed following the Amendment under Section 34, the meaning of the word "enforcement" as used in Section 36 of the Amendment Act was discussed.

It was submitted by the Appellants that there was a difference between enforcement and execution. It was stated that while enforcement dealt with procedural rights, execution dealt with substantive rights. The Respondents however stated that there is no difference between execution and enforcement, and "enforcement" under Section 36, is nothing but execution of an award, as if it were a decree under the Code of Civil Procedure, 1908. It was argued that it is well settled that execution proceedings are procedural in nature and would be retrospective, and therefore the substituted Section 36 would apply even in cases where application under Section 34 is made before the commencement of the Amendment Act. The judgment in *Lalji Raja and Sons v. Hansraj Nathuram*¹³ was referred to by the Court to better understand the argument, which itself relied upon several other decisions¹⁴ of the Privy Council. The word "has been" and its meaning and effect was also discussed before the Court by both the parties.

The Appellants contended that the expression "has been" mentioned in the amended Section 36(2) is entirely contextual, and equivalent to the expression "is".

¹³ (1971) 1 SCC 721.

¹⁴ *Hamilton Gell v. White*, [(1992) 2 KB 422]; *Abbot v. Minister for Lands*, [(1895) AC 425]; *G. Ogden Industries Pvt. Ltd. v. Lucas* [(1969) 1 All ER 121].

However, the Respondents argued here that the usage of the words “has been” in Section 36(2) of the Amendment Act highlights the retrospective effect of the Act on pending cases, where the appeal was filed before the commencement of the Amendment Act.

The Respondents finally stated that the original intent of the principal Act was to minimise Court intervention and to restrict the grounds of challenge of arbitral awards. It was argued that Court proceedings in this country take an exceptionally long time, and so the whole object of the amendment to Section 36 would be hampered, if Section 36 only applies to Court proceedings that result from arbitral proceedings, which have commenced on or after the commencement of the Amendment Act. However, strong reliance was placed on a judgment¹⁵ of the House of Lords to clarify that this could never be the case. The Hon’ble Supreme Court observed that originally Section 36 was a clog in the right of the decree holder, who could not execute the arbitral award in his favour until the suit for stay was disposed off. Thus, the Court established that Section 36 would in fact be applicable to Court proceedings which have commenced after the enforcement of the Amendment Act, even if the related arbitral proceedings were held and concluded before the Act was amended. For this the Court relied upon the judgments delivered in *Lalji Raja and Sons v. Hansraj Nathuram*¹⁶ and *Narhari Shivram Shet Narvekar v. Pannalal Umediram*¹⁷. It was stated that execution of the decree was a procedural law, and the judgment debtor was not vested with any substantive right to resist the execution of the award.

While concluding that Section 36 applies retrospectively, Section 6 of the General Clauses Act, 1897, was discussed intensively before the Court. The said section provides that repealing any enactment would not affect any right or privilege which accrues or incurs under the repealed enactment. The Court here held that an automatic stay of awards cannot be said to be a vested right under Section 6 of the General Clauses Act, since enforcement is not substantive, rather procedural in nature. Thus, being purely procedural, the provisions of the amended Section 36 could apply retrospectively.

CONTROVERSY REGARDING THE JUDGMENT

¹⁵ State of Kuwait v. Sir Fredrick Snow and Partners, (1984) 2 WLR 340.

¹⁶ Supra note 14.

¹⁷ (1976) 3 SCC 203.

The Union Cabinet gave its approval to introduce the Arbitration and Conciliation (Amendment) Bill of 2018 in the Parliament. One of the main features of this Bill is a provision to insert a new Section 87 in the Act. The provision states that the Amendment Act would only operate on arbitration proceedings commenced after the enforcement of the Amendment Act, i.e., October 23, 2015. This would mean that in all pending matters would be covered by the old law, despite the fact that Section 34 proceedings have been initiated only after October 23, 2015. This provision is however in contradiction to Section 26 of the Arbitration and Conciliation (Amendment) Act, which states that the amendments would be applicable to proceedings which have been commenced on or after the date of enforcement of the amended Act. This element of the Bill, being inconsistent with the judgment passed by the Supreme Court in the current case of *Board of Control for Cricket in India v. Kochi Cricket Pvt. Ltd.*¹⁸, has widely become a topic of controversy. A copy of the judgment was directed to be forwarded to the Ministry of Law and Justice, as well as the Attorney General for India, with the objective of doing away with the discrepancy between the judgment and the Bill.

The Apex Court through this judgment advised the Government to keep the Statement of Objects and Reasons of the Amendment Act in the forefront, if it wishes to enact the new Section 87 as proposed by the Bill. It was further stated that the immediate effect of this Section would be to put on a back-burner all the important amendments made by the Amendment Act, particularly the amendments made to Sections 28 and 34. The most important element here is that the provisions of the pre-amended law regarding the automatic stay of an award upon filing of a challenge, would now become applicable. At the same time, the provisions of the amended Act in relation to time limits for disposal of a challenge petition, will not apply. The bench also referred to the Law Commission's 246th Report¹⁹, which bifurcated the proceedings into two parts, making the Act applicable to proceedings commenced on or after 23rd October, 2015. It was mentioned here that the basic scheme of Section 26 of the Amendment Act should not be displaced, or else the very object of the enactment of the amended Act would be defeated.

CONCLUSION

¹⁸ Supra note 2.

¹⁹ Supra note 10.

Arbitration is being increasingly considered as an alternative and better method to resolve disputes. It is not only more flexible and cost effective, but also speedier than Court proceedings. The Arbitration and Conciliation Act was amended in 1996 to govern the arbitration laws and arbitral proceedings in the country. The principal Act was amended in 2015, bringing about some notable changes to the Act.

The decision of the Court was eagerly awaited in *Board of Control for Cricket in India v. Kochi Cricket Pvt. Ltd.*²⁰ to seek clarity upon the nature of the Amendment Act, and the applicability and scope of Sections 26, 34 and 36. The decision of the Court in this case would impact a lot of pending court and arbitration proceedings. After intense discussions and arguments, the Court finally decided in favour of Kochi Cricket Pvt. Ltd., stating that though the Amendment Act, as a whole, is prospective in nature, Section 36 would be applicable to even those cases in which Court proceedings were initiated after the Act was amended, even if they relate to arbitral proceedings that were initiated prior to enforcement of the Amendment Act. It was therefore concluded that while the Amendment Act itself has a prospective effect on pending cases, Section 36 is an exception, and would be applicable to pre-amendment cases as well. The amendment in Section 36, as a matter of fact, reinstates Article 36(2) of the UNCITRAL Model Law, which is essentially based upon Article VI of the New York Convention .

Through this judgment, the Apex Court has clearly indicated a pro-arbitration approach, by limiting the role of judiciary in arbitration proceedings. However, this decision is inconsistent with the Arbitration and Conciliation (Amendment) Bill, which has recently been approved by the Union Cabinet. The Bill has a provision to insert a new Section 87 in the Act, which would limit the application of the Act to only those arbitration proceedings which were commenced after the enforcement of the Amendment Act, i.e., after 23rd October, 2015.

This element has given rise to many controversies, and it remains to be seen how the government interprets the judgment, and whether it accommodates the same in the Bill.

²⁰ Supra note 2.